Supreme Court, U.S.
FILED
DEC 17 1991
OFFICE OF THE CLERK

No. (1)

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

MILDRED LOUISE BLAS,
et. al.,
Petitioners

versus

Government of Guam,
et. al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Gary Wayne Francis
Gumataotao, Esq.
COUNSEL FOR PETITIONERS
Law Offices of
Del Priore & Gumataotao,
P.C.
414 West Soledad Avenue
Suite 507, GCIC Bldg.
Agana, Guam 96910
Tel. No. (671)472-6906

Questions Presented For Review

1. Whether Guam Should Be Viewed As A Federal Agency Or Instrumentality For All Purposes Or Not.

2. If Guam Is An Agency Or Instrumentality For Some Purposes Only, Should It Be Recognized As An Agency Or Instrumentality In Suits Involving Such Agencies Or Instrumentalities Under FRAP Rule 4(a)?

LIST OF ALL THE PARTIES TO THE PROCEEDING

The list of all the parties to the proceeding in the United States Court of Appeals for the Ninth Circuit appears as follows:

MILDRED LOUISE BLAS, As Personal Representative of the Estate of JOHN MARVIN BLAS, On Her Behalf and as Guardian for the Minor, MARVIN JOHN BORJA, Petitioner;

v.

Government of Guam, JOSE T. CHARFAUROS, Individually and as Director of the Department of Corrections; FREDERICK B. QUINENE, Individually and as Deputy Director of the Department of Corrections; VICENTE CASTRO, Individually and as Superintendent of the Department of Corrections, Government of Guam, Respondents.

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW.....	1
JURISDICTION.....	1
CONSITUTIONAL AND STATUTORY PROVISIONS INVOLVED..	3
STATEMENT OF THE CASE.....	5
THE DECISION CREATES FEDERAL ISSUES.....	11
REASONS FOR GRANTING THE WRIT..	11
DISCUSSION.....	12
I. WHETHER GUAM SHOULD BE VIEWED AS A FEDERAL AGENCY OF INSTRUMENTALITY FOR ALL PURPOSES.....	12
II. IF GUAM IS AN AGENCY OR INSTRUMENTALITY FOR SOME PURPOSES ONLY, SHOULD IT BE RECOGNIZED AS AN AGENCY OR INSTRUMENTALITY IN SUITS INVOLVING SUCH AGENCIES OR INSTRUMENTALITIES UNDER FRAP RULE 4(a).....	19
CONCLUSION.....	34

TABLE OF AUTHORITIES

	PAGE
Bank of America National Trust & Savings Assn. v. Chaco 539 F.2d 1226-1228 (9th Cir. 1976).....	30
Barusch v. Calvo 685 F.2d 1199, 1201 (9th Cir. 1982).....	29,32
Diaz v. Trust Territory of the Pacific Islands 876 F.2d 1401, 1404, 1405 (9th Cir. 1989).....	16,27, 31,33
Domenech v. National City Bank 294 U.S. 199, 204-205, 79 L.Ed.2d 715 (1986).....	13
Grafton v. United States 206 U.S. 333, 354, 51 L.Ed. 1084, 27 S Ct 749 (1907).....	31
Hoag Ranchez v. Stockton Products Credit Association 846 F.2d 1225, 1227-28 (9th Cir. 1988).....	16
National Bank v. County of Yankton 101 U.S. 129, 133 (1879).....	20

TABLE OF AUTHORITIES
(Continued)

	PAGE
Ngiraingas v. Sanchez 858 F.2d 1368 (9th Cir. 1988) aff'd, 495 U.S. _____, 109 L.Ed.2d 163, 170, 110 S Ct 1737 (1990).....	12,14, 15,16, 17,21
Sakamoto v. Duty Free Shoppers Ltd. 764 F.2d 1385 (9th Cir. 1985) cert. den. 475 U.S. 1081, 106 S Ct 1457, 89 L.Ed.2d 715 (1986).....	14,15, 16,21
Simms v. Simms 175 U.S. 162, 168, 44 L.Ed 115, 20 S Ct 58 (1899).....	29
Snow v. United States 85 U.S. (18 wall) 317, 320 (1873).....	19
Talbott v. Silver Bow County 139 U.S. 438, 11 S Ct 594, 35 L.Ed 210.....	13
United States v. Wheeler 435 U.S. 313, 55 L.Ed.2d 303, 98 S Ct 1079 (1978).....	13
UNITED STATES CONSTITUTION	
Article IV, Section 3, Clause 2.....	3

TABLE OF AUTHORITIES
(Continued)

PAGE

STATUTES

12 U.S.C.S. Sec. 548	30
28 U.S.C.S. Sec. 1254(1).....	2
48 U.S.C.S. Sec. 1421.....	4,19, 29,30, 32
48 U.S.C.S. Sec. 1421a.....	3,13, 20,28
48 U.S.C.S. Sec. 1421h.....	17
48 U.S.C.S. Sec. 1421i.....	4,17,
48 U.S.C.S. Sec. 1421k.....	4,23, 29
48 U.S.C.S. Sec. 1421o.....	4,23
48 U.S.C.S. Sec. 1421p.....	4,23
48 U.S.C.S. Sec. 1422.....	4,17, 24,29, 32
48 U.S.C.S. Sec. 1422a.....	4,17
48 U.S.C.S. Sec. 1422d.....	4,24, 25,27, 28,30
48 U.S.C.S. Sec. 1423a.....	4,25

TABLE OF AUTHORITIES
(Continued)

	Page
48 U.S.C.S. Sec. 1423i.....	4,21, 24,25, 29
48 U.S.C.S. Sec. 1424.3(c).....	9
48 U.S.C.S. Sec. 1301.....	4,17
48 U.S.C.S. Sec. 8802.....	4,17
FEDERAL RULES	
FRAP Rule 4(a).....	9,10, 11,12, 16,18, 21,22, 26,34
FRAP Rule 26(b).....	1
FRAP Rule 31.....	1
NINTH CIRCUIT RULES	
Rule 26-1.....	1
TEXTS	
Leibowitz, Defining Status: A Comprehensive Analysis of United States Territorial Relations, pages 313, 323 (1989).....	13
Leibowitz, The Applicability of Federal Law to Guam 16 Va. J.L. Int'l. L. 44, 45 (1975).....	17,22

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit Case No. 90-16048 (For publication) filed July 31, 1991 is reported at 941 F.2d 778. The Order denying rehearing filed September 18, 1991 is not for publication.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was filed on July 31, 1991. (Appendix A). Timely Petition for Rehearing was sent to the Clerk, Ninth Circuit via DHL Courier Service on July 20, 1991 (Appendix P). Ninth Circuit Rule 26-1 extends by seven (7) days all deadlines for filing set forth in the Federal Rules of Appellate procedure and Ninth Circuit Rules except as provided by court order, FRAP 26(b) and 31. (Appendix O). The opinion denying

the rehearing was filed on September 18, 1991 (Appendix B). The jurisdiction of this Court is involved under 28 U.S.C.S. Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution
Article IV, Section 3, Clause 2:

> The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory of other Property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or any particular state.

48 U.S.C.S. Sec. 1421a:

> **Unincorporated territory; capital; powers of government; suits against government; type of government; supervision**
>
> Guam is hereby declared to be an unincorporated territory of the United States and the capital and seat of government thereof shall be located at the city of Agana, Guam. The government of Guam shall have the powers set forth in this Act shall have power to sue by such name, and with the consent of the legislature evidenced by enacted law, may be sued upon any contract entered into with respect to, or any tort committed incident to, the exercise by the government of Guam of any of its lawful powers. The government of Guam shall consist of three branches, executive, legislative, and judicial, and its relations with the Federal Government in all matters not the

program responsibility of another Federal department or agency, shall be under the general administrative supervision of the Secretary of the Interior.

48 U.S.C.S. Sec. 1421 (Appendix C)

48 U.S.C.S. Sec. 1421i (Appendix D)

48 U.S.C.S. Sec. 1421k (Appendix E)

48 U.S.C.S. Sec. 1421o (Appendix F)

48 U.S.C.S. Sec. 1421p (Appendix G)

48 U.S.C.S. Sec. 1422 (Appendix H)

48 U.S.C.S. Sec. 1422a (Appendix I)

48 U.S.C.S. Sec. 1422d (Appendix J)

48 U.S.C.S. Sec. 1423a (Appendix K)

48 U.S.C.S. Sec. 1423i (Appendix L)

42 U.S.C.S. Sec. 1301 (Appendix M)

42 U.S.C.S. Sec. 8802 (Appendix N)

Federal Rules of Procedure, Rule 4(a):

Rule 4. Appeal as of Right--When Taken.

(a) Appeals in Civil Cases.

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court

> within 30 days after the date of the entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

STATEMENT OF THE CASE

On January 17, 1984, John Marvin Blas (hereafter "Decedent") was murdered while under confinement at Building "D" of the Adult Correctional Facility, Department of Corrections ("DOC"), Government of Guam. At the time of the murder, DOC Building "D" was used to house violent, repetitive and long-term hardened criminals. Decedent was a short-term petty offender incarcerated for a non-violent crime and had only a few months to serve before

being released. Both the Government of Guam and the Superior Court agreed that Decedent was not to be housed with the hardened criminals, rather Decedent should have been transferred to a safer environment. Despite this agreement, DOC maintained Decedent in the dangerous community because of alleged overcrowding in its facility normally used for petty offenders.

Pursuant to the Government Claims Act, Sections 6500 et. seq. of the Government Code of Guam, Blas filed a claim against the Government of Guam on May 25, 1984 which claim was denied by the Government on November 3, 1984.

On May 20, 1986, Blas filed a Complaint for Violation of Civil Rights in the District Court of Guam (Civil Case No. 86-0032) against the Government of Guam and individual defendants in their

official and individual capacities. The complaint was filed within the eighteen (18) month limitation period of Sec. 6500.05 of the said Claims Act. The complaint's second cause of action was for wrongful death.

On October 26, 1986, Blas filed another complaint in the Superior Court of Guam, CV No. 1103-86, for wrongful death against the same defendants based upon the same nucleus of operative facts.

On October 27, 1986, the District Court of Guam dismissed the civil rights case against the Government of Guam and other defendants in both their official and individual capacities. Blas appealed the dismissal to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit Court reversed and remanded the case to the District Court of Guam, directing reinstatement of the case only

against the individual defendants in their individual capacities; that case is still pending in the District Court of Guam awaiting the determination of the Superior Court action.

The writ of certiorari being sought from this Court arose out of the Superior Court case as hereinafter shown.

On January 26, 1989, the defendants in the Superior Court case filed their motion for Summary Judgment on the grounds that the statute of limitations barred Blas' claim. Blas disagreed, and asserted that since the District Court action was filed within the eighteen (18) month limitation period of the Government Claims Act, such filing in the District Court equitably tolled the filing in the Superior Court. On August 14, 1989, the Superior Court held that the doctrine of equitable tolling was inapplicable to

Blas' claim against the Government of Guam and that Blas' claim against individual defendants were barred by Guam's two (2) year statute of limitation for personal injury actions.

On September 12, 1989, Blas filed her notice of appeal to the District Court of Guam, Appellate Division, appealing the Superior Court's August 14, 1989 decision. Jurisdiction over the appeal was based on 48 U.S.C.S. Sec. 1424-3(a)(b). On May 17, 1990, the District Court entered an opinion affirming the Summary Judgment of the Superior Court. On July 16, 1990, Blas appealed the District Court's decision to the United States Court of Appeals for the Ninth Circuit. Jurisdiction over the appeal was based on 48 U.S.C.S. Sec. 1424-3(c) and Federal Rules of Civil Procedure (FRCP) Rule 4(a). In her opening brief on the merits, Blas

contends that the Government of Guam is an agency or instrumentality of the federal government, hence her appeal brought within the sixty (60) day time limit is timely under FRAP Rule 4(a). The government and individual defendants served their response brief on the merits contemporaneously with a Motion to Dismiss for Failure to File a Timely Notice of Appeal under FRAP Rule 4(a). The Motion to Dismiss was argued and submitted on May 7, 1991. On July 31, 1991, the Ninth Circuit dismissed the Appeal as untimely, concluding that Guam is not an agency of the federal government for purposes of the 60-day time limit on appeals in suits involving such agencies under Rule 4(a). (Appendix A). Blas filed a petition for rehearing which the Ninth Circuit denied on September 18, 1991. (Appendix B).

THE DECISION CREATES FEDERAL ISSUES

The Ninth Circuit decided that:

(1) Guam should be viewed as a federal instrumentality for some purposes.

(2) Guam is not a federal agency or instrumentality for the purposes of the 60-day time limit of FRAP Rule 4(a).

REASONS FOR GRANTING THE WRIT

Blas presents these federal questions:

I.

Whether Guam Should Be Viewed As A Federal Agency Or Instrumentality For All Purposes Or Not Should Be Settled By This Court.

II.

If Guam Is An Agency Or Instrumentality For Some Purposes Only, Should It Be Recognized As An Agency Or Instrumentality

In Suits Involving Such Agencies Or Instrumentalities Under FRAP Rule 4(a).

DISCUSSION

(I)

Whether Guam Should Be Viewed as a Federal Agency or Instrumentality For All Purposes?

The question presented above is of utmost importance to the Territory of Guam vis-a-vis its relation to the federal government of the United States.

> "Guam, an island of more than 200 square miles located in the West Central Pacific, became a United States possession at the conclusion of the Spanish-American war by the Treaty of Paris, Art. II, 30 Stat 1755. Except for the period from December 1941 to July 1944, when Japan invaded and occupied the island, the United States Navy administered Guam's affairs from 1898 to 1950, when the Organic Act was passed . . ." Ngiraingas v. Sanchez, 495 US _ _, 109 L Ed. 2d 163, 170, 110 S Ct 1737 (1990) See, A.

Leibowitz, Defining Status: A Comprehensive Analysis of United States Territorial Relations 313, 323 (1989).

Guam is an unincorporated territory of the United States, 48 U.S.C. 1421a. In the United States, a "Territory" is not a distinct sovereignty and has no independent powers. It is a political community organized by Congress, all of whose powers are created by Congress and all of whose acts are subject to Congressional supervision. Talbott v. Silver Bow County, 139 U.S. 438, 11 S Ct. 594, 35 L Ed. 210 (1891). Indeed, this Court in United States v. Wheeler, 435 US 313, 55 L Ed. 2d 303, 98 S Ct 1079 (1978) citing to Domenech v. National City Bank, 294 U.S. 199, 204-205, 79 L Ed. 857, 55 S Ct 366 (1935) held:

> ". . .when a territorial government enacts and enforces criminal laws to govern its inhabitants, it is not acting as

> an independent political community like a State, but as an agency of the federal government. . ." 55 L Ed. 2d at 311.

Addressing the issue of Guam's status in relation to the federal government, the Ninth Circuit in the case of Sakamoto v. Duty Free Shoppers, Ltd. 764 F. 2d 1385 (9th Cir. 1985), Cert. den. 475 U.S. 1081, 106 S Ct. 1457. 89 L Ed. 2d 715 (1986) held that "since Guam is an unincorporated territory enjoying only such powers as may be delegated to it by Congress in the Organic Act of Guam, 48 U.S.C. Sec 1421(a), the Government of Guam is in essence an instrumentality of the federal government . . ." (citations omitted). The Ninth Circuit confirmed the Sakamoto ruling in a subsequent case of Ngiraingas v. Sanchez, 858 F. 2d 1368 (9th Cir. 1988), aff'd. 495 U.S.____, 109 L Ed 2d 163, 110 S Ct 1737 (1990), where the court

held that "Because we are bound by Sakamoto's instructions that Guam is a 'creation of Congress' and no more than an 'instrumentality of the federal government' 764 F. 2d 1286, we conclude that Guam is not a 'person' chargeable with violating territorial laws under Section 1983." At 1371, 1372. The Ninth Circuit further stated:

> "we held above that the government is in all respects an instrumentality of the federal government and therefore not a person for the purposes of Section 1983. Ibid, at 1372. (Emphasis added)"

This court affirmed the Ngiraingas decision that neither the Territory of Guam nor its officers acting in their official capacities are "persons" under Sec. 1983. Ngiraingas, supra, 109 L Ed. 2d at 174.

In the instant case, the Ninth Circuit ruled that while Guam should be

viewed as a Federal instrumentality for some purposes, Ngiraingas, supra, Sakamoto, supra, the court also reorganized that the designation of an organization as a federal instrumentality is not dispositive as to whether the organization is a federal agency for purposes of FRAP Rule 4(a). citing Hoag Ranches v. Stockton Products Credit Association (In re Hoag Ranches) 846 F.2d 1225, 1227-28 (9th Cir. 1988) and Diaz v. Trust Territory of the Pacific Islands, 876 F.2d 1401, 1404, 1405 (9th cir. 1989).

In Diaz, the Court considered six factors to be relevant in holding that the Trust Territory of the Mariana Islands was a federal agency for purposes of FRAP Rule 4(a). (Appendix A). Consideration of those factors compelled the court to reach an opposite conclusion in the case at bar, reasoning that Guam's executive is elected

by its citizens (48 U.S.C. 1422, 1422(a)); Guam collects a territorial income tax to finance itself, 48 U.S.C. 1421h, 1421i; it is included under the definition of "state" in several federal statutes, and is thus not treated like an arm of the federal government in that respect (42 U.S.C. 1301, 8802); and finally, there is no federal involvement in Guam's litigation decision-making process.

It is quite evident from the foregoing that Guam as an unincorporated territory is sometimes treated like other territories, sometimes like a state, and sometimes even like a foreign country * See, Leibowitz, The Applicability of Federal Law to Guam. 16 Va. J. L. Int'l. 44, 45. (1975). This court has already affirmed the Ninth Circuit's decision re Ngiraingas, supra, that Guam's not a person for purposes of Sec. 1983. Blas

asserts that it is necessary for this Court to also decide that Guam is an agency of the federal government for all purposes, including for purposes of FRAP Rule 4(a).

(II)

If Guam Is An Agency or Instrumentality For Some Purposes Only, Should It be Recognized As An Agency or Instrumentality In Suits Involving Such Agencies or Instrumentalities Under FRAP Rule 4(a)?

The Territory of Guam was ceded to the United States in accordance with the Treaty of Peace between the United States and Spain as signed in Paris on December 10, 1898, and proclaimed on April 11, 1899. 48 U.S.C. Sec 1421. The United States Navy administered Guam's affairs from 1898 to 1950 (except during the Japanese occupation, December 1941 to July 1944). The Organic Act of Guam was enacted in 1950 declaring Guam to be an

unincorporated territory of the United States, the governmental control of which is held at the federal level.

48 U.S.C. Sec. 1421(a) states pertinent parts:

> ". . . The government of Guam shall have the powers set forth in this Act. . . . The government of Guam shall consist of three branches, executive, legislative and judicial, and its relations with the Federal Government in all matters not the program responsibility of another Federal department or agency, shall be under the general administrative supervision of the Secretary of Interior."

This grant of authority is restrictive rather than plenary; See, National Bank v. County of Yankton, 101 US 129, 133 (1879) and Guam has no power to act in the absence of a specific authorization from Congress. See, Snow v.

United States, 85 US (18 Wall) 317, 320 (1873).

Because the Government of Guam shall have the powers as set forth in the Organic Act only and since its relations with the Federal government in all matters shall be under the administrative supervision of the Secretary of Interior, if not the program responsibility of any other Federal department or agency, Guam is no more than an agency of the federal government. In Sakamoto, supra, and Ngiraingas, supra, the Ninth Circuit ruled to that effect. However, in the instant case, the Ninth Circuit held that it is not an agency of the federal government as that term is contemplated under FRAP Rule 4(a). Blas asserts that since Guam is merely a creation of a federal statute and under the total control of Congress (See, E.g., 48 U.S.C. Sec. 1423i) there is no

reason why Guam should not be accorded the same status as the agencies contemplated under FRAP Rule 4(a).

Guam marches to the beat of the federal drum and as an agency, its authority to administer itself and to set policy is derived from, and circumscribed by Congress. Though Guam may be like a municipality or state than a run-of-the-mill federal agency, Guam as a creation of the Federal government stands in sharp contrast to "bodies politic" as that phrase is normally understood. See, Leibowitz, 16 Va. J. Int'l. at 35. Guam's total lack of autonomy possessed by states and commonwealths within the federal system is exemplified by but not limited to the following powers vested in the federal government, which powers are being exercised on a regular basis.

1. President's authority to designate and maintain naval and military reservations (48 U.S.C.S. Sec. 1421k);

2. Secretary of Agriculture's uninhibited use of Guam's agencies, facilities and employees toward fire control, watershed protection and reforestation (48 U.S.C.S. Sec. 1421o) and allocation of federal funds to accomplish same (48 U.S.C.S. Sec. 1421p);

3. Although Guam's Governor is elected by Guam's residents, he is responsible for the execution of not only Guam's laws but the laws of the United States and, additionally, must take an annual report of all the transactions of Guam's

government directly to the Secretary of the Interior (48 U.S.C.S. Sec 1422) (emphasis added);

4. The Secretary of Interior appoints Guam's government comptroller, which comptroller is under the general supervision of the Secretary of the Interior and his salary is paid from funds authorized to be appropriated to the Department of the Interior (48 U.S.C.S. Sec 1422d;

5. The federally appointed government comptroller audits, reviews, and recommends adjudication of claims pertaining to the Guam's revenue and receipts, as well as all expenditures of funds and

property pertaining to the Government of Guam and reports all findings directly to the Secretary of the Interior (48 U.S.C.S. Sec. 1422d;

6. The power of Guam's legislature and Guam's ability to borrow money fall under the direct supervision of the federal government's Secretary of Interior, who may guarantee payment on bonds or other obligations as he deems appropriate (48 U.S.C.S. Sec. 1423a);

7. The power of Guam's legislature to pass laws is subject to **censure** and **annulment** by the Congress of the United States (48 U.S.C.S. Sec 1423i); and

The Territory of Guam's government is not an independent entity. It has not been raised to the level of a commonwealth as has Puerto Rico. The Territory of Guam does not have a constitution. It is a unique and unincorporated territory of the United States. The people of Guam do not have the rights accorded all other United States citizens except those limited rights contained in the Organic Act.

The people of Guam are not sovereign, nor does the Government of Guam have a sovereignty which flows from its people through a constitution. Rather, the Congress of the United States has created the Government of Guam as a limited supervisory entity.

Also, the additional elements of the Organic Act have **never** been fully implemented by the Executive Branch. Material to the instant controversy is the

fact that the Executive Branch has ignored the Congressional mandate contained in the Organic Act, which requires the federal military authorities to relinquish the military-controlled civil plants and activities located within the Territory of Guam, e.g. Fena Dam Reservoir, all utilities (including electrical generation plants), Maina well, etc. These civil plants have not been relinquished and are the topic of heated debate in the self-determination talks currently taking place between the federal government and the people of Guam.

Defendants are strictly controlled at the federal level of the United States government and, therefore, are federal instrumentalities within the purview of the agencies contemplated by Rule 4(a).

In Diaz, supra, the Ninth Circuit considered six factors to be relevant

whether the government of the Trust Territory of the Mariana Islands was a federal agency for purposes of FRAP Rule 4(a)

> "... (1) the extent to which the entity at issue performed a governmental function; (2) the scope of the federal government's involvement in the management of that entity; (3) whether the entity's operations were financed by the federal government; (4) proprietary interests of persons other than the federal government; (5) whether the entity is treated as an arm of the federal government in federal statutes; and (6) whether the entity is treated as an arm of the federal government under the Federal Tort Claims Act."

Addressing the above factors, Blas contends:

(1) The government of Guam performs governmental functions in the Territory of Guam. 48 U.S.C. Sec. 1421a; and for the United States, i.e., The Secretary of Treasury has delegated to the government of guam the authority to administer United

States customs in Guam. Barusch V. Calvo, 685 F.2d 1199, 1201. (9th Cir. 1982).

(2) Congress may annul any act of the Guam legislature. 48U.S.C. Sec. 1423i; the Government of Guam is subject to audit by the Inspector General, Department of Interior. 48 U.S.C. Sec. 1422d; the President has the authority to designate and maintain Naval and Military reservations in Guam. 48 U.S.C. Sec. 1421k.; the Governor of Guam prepares & submit to the Congress & the Secretary of Interior an annual comprehensive report and is responsible for the faithful execution of the laws of Guam and the laws of the United States applicable to Guam. 48 U.S.C. Sec. 1422.

(3) The Government of Guam's operations are indirectly financed by the federal government. The enactment of section 31 of the Organic Act (48 U.S.C.

Sec. 1421;) by the United States Congress of the territorial income tax was done primarily to relieve the United States Treasury of the necessity of making direct appropriations; Congress only delegated the collection and enforcement functions to the Government of Guam, but Guam itself is powerless to vary the terms of the federal income tax laws as applied to Guam, except as permitted by Congress. Bank of America; National Trust & Savings Association V. Chaco, 539 F.2d 1226-1228 (9th Cir. 1976); As safeguard to this appropriation, the Government of Guam is subject to audit by the Inspector General of the Department of Interior. 48 U.S.C. 1422d.

The Guam Territorial income tax is not a tax imposed by Guam for purposes of 12 U.S.C. Sec. 548. Chaco, supra at 1228.

For the fiscal year 1989 about 12.8% or $47,676,051.00 was received by the Government of Guam directly from the federal government. (Aflague Affidavit, Appendix Q)

(4) There are no persons who have proprietary interest in the Government of Guam, except the federal government. The jurisdiction and authority of the United States over a territory like Guam is paramount. Grafton v. United States, 206 US 333, 354, 51 L Ed 1084, 27 S Ct 749 (1907); Congress has entire dominion and sovereignty and full legislature power over Territories. (Simms v. Simms, 175 U.S. 162, 168. 44 L Ed 115, 20 S Ct 58 (1899).

(5) The Government of Guam is treated as an arm of the federal government in federal statutes. Congress has delegated the collection and

enforcement of income tax laws of the federal government to the Government of Guam. 48 U.S.C. Sec. 1421; Chaco, Supra. The Government of Guam is responsible for the faithful execution of the laws of Guam and the laws of the United States applicable to Guam. 48 U.S.C. Sec. 1422. The Plant Quarantine Act is applicable to Guam. 7 C.F.R. Sec. 319.37-27 (1981). A Memorandum of Understanding between Guam's Department of Agriculture & the United States Department of Agriculture delegates to Guamanian officials authority to conduct any necessary agriculture inspections. Barusch v. Calvo, supra, footnote 2, at 1201. The Secretary of the Treasury has delegated to the Government of Guam the authority to administer United States customs in Guam. Ibid, at 1201.

(6) Though the government of Guam may not be treated as an arm of the federal

government under the Federal Tort Claims Act, it has been treated as an arm of the federal government in many other respect as shown above. It must be noted that the Ninth Circuit in Diaz, supra is silent as to whether all the above six factors should be present in determining whether an entity is an agency of the United States.

CONCLUSION

Guam is an unincorporated territory of the United States enjoying only such power as may be delegated by Congress in the Organic Act. As such it is like an instrumentality or agency of the federal government; much like a federal department or administrative agency. Like an agency it may administer its own affairs, draft laws of general applicability and even create an entire infrastructure of government. But, as an agency, its authority to administer itself is derived from and circumscribed by Congress.

This Court has not yet ruled, and should rule as to whether Guam is an agency of the federal government for the purposes of FRAP Rule 4(a). This Court's ruling may also help clarify the treatment sometimes accorded Guam as a foreign country, as one of the states, like other

territories and sometimes as a quite unique entity.

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully re-submitted this 21st day of January, 1992.

Gary Wayne Francis Gumataotao, Esq.
Attorney for the Petitioners

LAW OFFICES OF
DEL PRIORE & GUMATAOTAO, PC.
Suite 507 G.C.I.C. Bldg.
414 West Soledad Avenue
Agana, Guam 96910
Ph. No. (671) 472-6906

(2)

Supreme Court, U.S.
FILED
DEC 17 1991
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

MILDRED LOUISE BLAS,
et. al.,

Petitioners

versus

Government of Guam,
et. al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

A P P E N D I X

Gary Wayne Francis
Gumataotao, Esq.
COUNSEL FOR PETITIONERS
Law Offices of
Del Priore & Gumataotao,
P.C.
414 West Soledad Avenue
Suite 507, GCIC Bldg.
Agana, Guam 96910
Tel. No. (671)472-6906

TABLE OF CONTENTS

Appendix	Description	Page in Petition
A	9th Circuit Opinion, 7/31/91	1
B	9th Circuit Opinion, 9/18/91	1,2
C	48 U.S.C.S. Sec 1421	4,19,29, 30,32
D	48 U.S.C.S. Sec 1421i	4,17
E	48 U.S.C.S. Sec 1421k	4,23,29
F	48 U.S.C.S. Sec 1421o	4,23
G	48 U.S.C.S. Sec 1421p	4,23
H	48 U.S.C.S. Sec 1422	4,17,24, 29,32
I	48 U.S.C.S. Sec 1422a	4,17
J	48 U.S.C.S. Sec 1422d	4,24,25, 27,28,30
K	48 U.S.C.S. Sec 1423a	4,25
L	48 U.S.C.S. Sec 1423i	4,21,24, 25,29
M	42 U.S.C.S. Sec 1301	4,17
N	42 U.S.C.S. Sec 8802	4,17
O	9th Circuit Rule 26-1	1
P	Certificate of Service	1
Q	Aglague Affidavit	31

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MILDRED LOUISE BLAS, as Personal Representative of the Estate of John Marvin Blas, on her own behalf, and as Guardian for the Minor, Marvin John Borja,
Plaintiff-Appellant,

v.

GOVERNMENT OF GUAM; JOSE T. CHARFAUROS, Individually and as Director of the Department of Corrections; FREDRICK B. QUINENE, Individually and as Deputy Director of the Department of Corrections; VICENTE CASTRO, Individually and as Superintendent of the Department of Corrections, Government of Guam,
Defendants-Appellees.

No. 90-16048
D.C. No.
CV-89-00052-DHM
OPINION

Appeal from the United States District Court
for the District of Guam, Appellate Division
Munson, Hatter and Duenas, Judges, Presiding

Argued and Submitted
May 7, 1991—Honolulu, Hawaii

Filed July 31, 1991

Before: Mary M. Schroeder, Betty B. Fletcher and
Warren J. Ferguson, Circuit Judges.

Opinion by Judge Schroeder

SUMMARY

Appeals

Dismissing an appeal from a decision of the Appellate Division of the District Court of Guam as untimely, the court of appeals held that Guam was not an agency of the federal government for purposes of the 60-day time limit on appeals in suits involving such agencies under Rule 4(a).

Appellant Mildred Louise Blas brought a wrongful death action against the government of Guam for the death of her son in a Guam prison. The Superior Court of Guam determined that her complaint was barred by the statute of limitations. The Appellate Division of the District of Guam affirmed. Blas' appeal to the Ninth Circuit was not filed within the 30-day period provided in Fed. R. App. P. 4(a)(1). Blas argued that she was entitled to the 60-day period provied in that Rule for cases in which the United States or one of its agencies is a party.

[1] While the Ninth Circuit has not previously decided whether Guam is a federal agency for purposes of Rule 4(a)(1), it has recognized that Guam should be viewed as a federal instrumentality for some purposes. Nevertheless, the court has also recognized that the designation of an organization as a federal instrumentality is not dispositive as to whether the organization is a federal agency for purposes of that Rule. [2] Consideration of the factors in *Diaz v. Trust Territory of the Pacific Islands* that led the court to conclude that the government of the Trust Territory of the Mariana Islands was a federal agency for purposes of the same Rule compelled the opposite conclusion in this case. Although the government of Guam, like that of the Trust Territory, performs the governmental function of administration of an unincorporated territory, its executive, unlike that of the Trust Territory, is elected by its own citizens. Guam collects an

income tax to finance itself, and is included in the definition of "state" in several federal statutes. Thus, it is not treated as an arm of the federal government. Therefore, the appeal was dimissed as untimely.

COUNSEL

Gary W.F. Gumataotao, Law Office of Del Priore & Gumataotao, Agana, Guam, for the plaintiff-appellant.

Kenneth R. Orcutt, Assistant Attorney General, Agana, Guam, for the defendants-appellees.

OPINION

SCHROEDER, Circuit Judge:

Mildred Louise Blas appeals from a decision of the Appellate Division of the District Court of Guam affirming the Guam Superior Court's determination that her complaint was barred by the statute of limitations. The underlying suit was a wrongful death action against the government of Guam and various individual corrections officers, based upon the death of her son in a Guam prison. *See* Guam Government Code §§ 65.00 -.07. The dispositive issue here is whether the appeal is untimely because it was not filed within the 30-day period provided in Fed. R. App. P. 4(a)(1). Blas maintains that she is entitled to the 60-day period provided in that Rule for cases in which the United States or one of its agencies is a party. The issue before us is whether the government of Guam is an agency of the United States within the meaning of that Rule.[1]

[1]The Rule provides:

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of

[1] This court has not previously decided whether Guam is a federal agency for purposes of Rule 4(a)(1). We have recognized that Guam should be viewed as a federal instrumentality for some purposes. *See Ngiraingas v. Sanchez*, 858 F.2d 1368, 1370 (9th Cir. 1988), *aff'd*, 110 S. Ct. 1737 (1990); *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1286 (9th Cir. 1985), *cert. denied*, 475 U.S. 1081 (1986). Nevertheless, the court has also recognized that the designation of an organization as a federal instrumentality is not dispositive as to whether the organization is a federal agency for purposes of Rule 4(a)(1). *Hoag Ranches v. Stockton Prod. Credit Ass'n (In re Hoag Ranches)*, 846 F.2d 1225, 1227-28 (9th Cir. 1988).

The relevant analysis is provided by our decision in *Diaz v. Trust Territory of the Pacific Islands*, 876 F.2d 1401, 1404-05 (9th Cir. 1989). There, we considered whether the government of the Trust Territory of the Mariana Islands was a federal agency for purposes of the same provision. In *Diaz*, we considered six factors to be relevant: (1) the extent to which the entity at issue performed a governmental function; (2) the scope of the federal government's involvement in the management of that entity; (3) whether the entity's operations were financed by the federal government; (4) proprietary interests of persons other than the federal government; (5) whether the entity is treated as an arm of the federal government in federal statutes; and (6) whether the entity is treated as an arm of the federal government under the Federal Tort Claims Act. *Id.* We concluded that the Trust Territory was an

---

appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

agency of the United States because it performed a governmental function, its executive officer was appointed by the President with the advice and consent of the Senate, its operations were largely funded by the United States Treasury, and its litigation decision making processes included the United States government. *Id.* at 1405.

[2] Consideration of these factors in this case compels the opposite conclusion. Although the government of Guam, like that of the Trust Territory, performs the governmental function of administration of an unincorporated territory, its executive, unlike that of the Trust Territory, is elected by its own citizens. *See* 48 U.S.C. §§ 1422, 1422a. Guam collects a territorial income tax to finance itself. *See* 48 U.S.C. §§ 1421h, 1421i. It is included under the definition of "state" in several federal statutes, and is thus not treated like an arm of the federal government in that respect. *See, e.g.*, 42 U.S.C. §§ 1301, 8802. Finally, Guam asserts, and Blas does not dispute, that there is no federal involvement in its litigation decision making processes. Thus, each factor that supported our decision to treat the Trust Territory as a federal agency weighs against according such treatment to Guam.

For these reasons, we conclude that Guam is not an agency of the federal government for purposes of the 60-day time limit on appeals in suits involving such agencies under Rule 4(a). The appeal in this case was therefore untimely and must be DISMISSED.

IT IS SO ORDERED.

APPENDIX B

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MILDRED LOUISE BLAS, as Personal Representative of the Estate of John Marvin Blas, on her own behalf, and as Guardian for the Minor, Marvin John Borja,	)	No. 90-16048
	)	D.C. #CV-89-00052-DHM
	)	(District of Guam)
Plaintiff-Appellant,	)	
v.	)	**ORDER**
GOVERNMENT OF GUAM, JOSE T. CHARFAUROS, Individually and as Director of the Department of Corrections) FREDERICK B. QUINENE,	)	

Individually and as)
Deputy Director of the)
Department of Corrections)
VICENTE CASTRO,)
Individually and as)
Superintendent of the)
Department of Corrections)
Government of Guam,)
)
Defendants-Appellees)
_____)

Before: **SCHROEDER, FLETCHER and FERGUSON, Circuit Judges**

The panel as constituted above has voted to deny the petition for rehearing. (Stamped FILED on September 18, 1991 by Cathy A. Caterson, Clerk of U.S. Court of Appeals)

APPENDIX C

GENERAL PROVISIONS

48 U.S.C.S. §1421. Territory included under name Guam

The territory ceded to the United States in accordance with the provisions of the Treaty of Peace between the United States and Spain, signed at Paris, December 10, 1898, and proclaimed April 11, 1899, and known as the island of Guam in the Mariana Islands, shall continue to be known as Guam.

(Aug. 1, 1950, ch 512, § 2, 64 Stat. 384.)

APPENDIX D

48 U.S.C.S. § 1421i. Income tax

(a) Applicability of Federal laws; separate tax. The income-tax laws in force in the Untied States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam: Provided, That notwithstanding any other provision of law, the Legislature of Guam may levy a separate tax on all taxpayers in an amount not to exceed 10 per centum of their annual income tax obligation to the Government of Guam.

(b) Guam Territorial income tax. The income-tax laws in force in Guam pursuant to subsection (a) of this section shall be deemed to impose a separate Territorial income tax, payable to the government of Guam, which tax is designated the "Guam Territorial income tax".

(c) Enforcement of tax. The administration and enforcement of the Guam Territorial income tax shall be performed by or under the supervision of the Governor. Any function needful to the administration and enforcement of the income-tax laws in force in Guam pursuant to subsection (a) of this section shall be performed by any officer or employee of the government of Guam duly authorized by the Governor (either directly, or indirectly by one or more redelegations of authority) to perform such function.

(d) Definition of "income-tax laws"; administration and enforcement; rules and regulations. (1) The income-tax laws in force in Guam pursuant to subsection (a) of this section include but are not limited to the following provisions of the Internal Revenue Code of 1954, where not manifestly inapplicable or incompatible with the intent of this section: Subtitle

A [26 USCS §§ 1 et seq.] (not including chapter 2 and section 931 [26 USCS §§ 1401 et seq., 931 [26 USCS §§ 1401 et seq., 931]); chapters 24 and 25 of subtitle C [26 USCS §§ 3401 et seq., 3501 et seq.], with reference to the collection of income tax at source on wages; and all provisions of subtitle F [26 USCS §§ 6001 et seq.] which apply to the income tax, including provisions as to crimes, other offenses, and forfeitures contained in chapter 75 [26 USCS §§ 7201 et seq.]. For the period after 1950 and prior to the effective date of the repeal of any provision of the Internal Revenue Code of 1939 which corresponds to one or more of those provisions of the Internal Revenue Code of 1954 [26 USCS §§ 1 et seq.] which are included in the income-tax laws in force in Guam pursuant to subsection (a) of this section, such income-tax laws include but

are not limited to such provisions of the Internal Revenue Code of 1939.

(2) The Governor of his delegate shall have the same administrative and enforcement powers and remedies with regard to the Guam Territorial income tax as the Secretary of the Treasury, and other United States income tax. Needful rules and regulations not inconsistent with the regulations prescribed under section 7654(e) of the Internal Revenue Code of 1954 [26 USCS §7654(e)] for enforcement of the Guam Territorial income tax shall be prescribed by the Governor. The Governor or his delegate shall have authority to issue, from time to time, in whole or in part, the test of the income-tax laws in force in Guam pursuant to subsection (a) of this section.

(e) Substitution of terms. In applying as the Guam Territorial income tax the income-tax laws in force in Guam pursuant

to subsection (a) of this section, except where it is manifestly otherwise required, the applicable provisions of the Internal Revenue Codes of 1954 and 1939, shall be read so as to substitute "Guam" for "United States", "Governor or his delegate" for "Secretary of his delegate", "Governor or his delegate" for "Commissioner of Internal Revenue" and "Collector or Internal Revenue", nomenclature and other language, including the omission of inapplicable language, where necessary to effect the intent of this section.

(f) Criminal offenses; prosecution. Any act or failure to act with respect to the Guam Territorial income tax which constitutes a criminal offense under chapter 75 of subtitle F of the Internal Revenue Code of 1954 [26 USCS §§ 7201 et seq.], or the corresponding provisions of the Internal Revenue Code of 1939, as

included in the income-tax laws in force in Guam pursuant to subsection (a) of this section, shall be an offense against the government of Guam and may be prosecuted in the name of the government of Guam by the appropriate officers thereof.

(g) Liens. The government of Guam shall have a lien with respect to the Guam Territorial income tax in the same manner and with the same effect, and subject to the same conditions, as the United States has a lien with respect to the United States income tax. Such lien in respect of the Guam Territorial income tax shall be enforceable in the name of and by the government of Guam. Where filing of a notice of lien is prescribed by the income-tax laws in force in Guam pursuant to subsection (a) of this section, such notice shall be filed in the Office of the Clerk of the District Court of Guam.

(h) Jurisdiction of District Court; suits for recovery or collection of taxes; payment of judgment. (1) Notwithstanding any provision of section 22 of this Act [48 USCS §1424] or any other provision of law to the contrary, the District Court of Guam shall have exclusive original jurisdiction over all judicial proceedings in Guam, both criminal and civil, regardless of the degree of the offense or of the amount involved, with respect to the Guam Territorial income tax.

(2) Suits for the recovery of any Guam Territorial income tax alleged to have been erroneously or illegally assessed or collected, or of nay penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, under the income-tax laws in force in Guam, pursuant to subsection (a) of this section, may, regardless of the amount of

claim, be maintained against the government of Guam subject to the same statutory requirements as are applicable to suits for the recovery of such amounts maintained against the United States in the United States district court with respect to the United States income tax. When any judgment against the government of Guam under this paragraph has become final, the Governor shall order the payment of such judgments out of any unencumbered funds in the treasury of Guam.

(3) Execution shall not issue against the Governor or any officer or employee of the government of Guam on a final judgment in any proceeding against him for any acts or for the recovery of money exacted by or paid to him and subsequently paid into the treasury of Guam, in performing his official duties under the income-tax laws in force in Guam pursuant to subsection

(a) of this section, if the court certifies that --

(A) probable cause existed; or

(B) such officer or employee acted under the directions of the Governor or his delegate.

When such certificate has been issued, the Governor shall order the payment of such judgment out of any unencumbered funds in the treasury of Guam.

(4) A civil action for the collection of the Guam Territorial income tax, together with fines, penalties, and forfeitures or for the recovery of any erroneous refund of such tax, may be brought in the name of and by the government of Guam in the District Court of Guam or in any district court of the United States or in any court having the jurisdiction of a district court of the United States.

(5) The jurisdiction conferred upon the District Court of Guam by this subsection

shall not be subject to transfer to any other court by the legislature, notwithstanding section 22(a) of this Act [48 USCS § 1424(a)].

Aug. 1, 1950, ch 512, §31, 64 Stat. 392; Aug. 20, 1958, P.L. 85-688, § 1, 72 Stat. 681; Oct. 31, 1972, P.L. 92-606, § 1(d), 86 Stat. 1497; Oct. 15, 1977, P.L. 95-134, Title II, § 203(c), 91 Stat. 1162.)

APPENDIX E

48 U.S.C.S. § 1421k. Designation of naval or military reservations; closed port

Nothing contained herein shall be construed as limiting the authority of the President to designate parts of Guam as naval or military reservations, nor to restrict his authority to treat Guam as a closed port with respect to the vessels and aircraft of foreign nations.

(Aug. 1, 1950, ch 512, § 33, 64, Stat. 393.)

APPENDIX F

48 U.S.C.S. § 1421o. Federal assistance for fire control, watershed protection, and reforestation

The Secretary of Agriculture is authorized to provide financial and technical assistance to Guam for improving fire control, watershed protection and reforestation, consistent with existing laws, administered by the Secretary of Agriculture, which are applicable to the continental United States. The program authorized by this section shall be developed in cooperation with the territorial government of Guam and shall be covered by a memorandum of understanding agreed to by the territorial government and the Department. The Secretary may also utilize the agencies, facilities, and employees of the Department, and may cooperate with other

public agencies and with private organizations and individuals in Guam and elsewhere.

(Sept. 19, 1974, P L 93-42. §1, 88 Stat. 1154)

APPENDIX G

48 U.S.C.S. § 1421p. Authorization of appropriations

There are hereby authorized to be appropriated such sums as may be necessary to carry out the purposes of this Act [48 USCS §§ 1421o, 1421p]. Sums appropriated in pursuance of this Act [48 USCS 1421o, 1421p] may be allocated to such agencies of the Department as are concerned with the administration of the program in Guam (Sept. 19, 1974, P.L. 93-421, §2, 88 Stat. 1154.)

APPENDIX H

THE EXECUTIVE BRANCH

48 U.S.C.S. § 1422. Governor and Lieutenant Governor; term of office; qualifications; powers and duties; annual report to Congress

The executive power of Guam shall be vested in an executive officer whose official title shall be the "Governor of Guam". The Governor of Guam, together with the Lieutenant Governor, shall be elected by a majority of the votes case by the people who are qualified to vote for the members of the Legislature of Guam. The Governor and Lieutenant Governor shall be chosen jointly, by the casting by each voter of a single vote applicable to both offices. If no candidates receive a majority of the votes case in any election, on the fourteenth day thereafter a runoff election shall be held between

the candidates for Governor and Lieutenant Governor receiving the highest and second highest number of votes cast. The first election for Governor and Lieutenant Governor shall be held on November 3, 1970. Thereafter, beginning with the year 1974, the Governor and Lieutenant Governor shall be elected every four years at the general election. The Governor and Lieutenant Governor shall hold office for a term of four years and until their successors are elected and qualified.

No person who has been elected Governor and Lieutenant Governor shall commence on the first Monday of January following the date of election.

No person shall be eligible for election to the office of Governor or Lieutenant Governor unless he is an eligible voter and has been for five consecutive years immediately preceding the election a citizen of the United States and a bona

fide resident of Guam and will be, at the time of taking office, at least thirty years of age. The Governor shall maintain his official residence in Guam during his incumbency.

The Governor shall have general supervision and control of all the departments, bureaus, agencies, and other instrumentalities of the executive branch of the government of Guam. He may grant pardons and reprieves and remit fines and forfeitures for offenses against local laws. He may veto any legislation as provided in this Act. He shall appoint, and may remove, all officers and employees of the executive branch of the government of Guam, except as otherwise provided in this or any other Act of Congress, or under the laws of Guam, and shall commission all officers that he may be authorized to appoint. He shall be responsible for the faithful execution of

the laws of Guam and the laws of the United States applicable in Guam. Whenever it becomes necessary, in case of disaster, invasion, insurrection, or rebellion, or imminent danger thereof, or to prevent or suppress lawless violence, he may summon the posse comitatus or call out the militia or request assistance of the senior military or naval commander of the Armed Forces of the United States in Guam, which may be given at the discretion of such commander if not disruptive of, or inconsistent with, his Federal responsibilities. He may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, proclaim the island, insofar as it is under the jurisdiction of the government of Guam, to be under marital law. The members of the legislature shall meet forthwith on their own initiative and may,

by a two-thirds vote, revoke such proclamation.

48 U.S.C.S. § 1422. Governor and Lieutenant Governor; term of office; qualifications; powers and duties; annual report to Congress

[First five undesignated paras, unchanged] The Governor shall prepare, publish, and submit to the Congress and the Secretary of the Interior a comprehensive annual financial report in conformance with the standards of the National Council on Governmental Accounting within one hundred and twenty days after the close of the fiscal year. The comprehensive annual financial report shall include statistical data as set forth in the standards of the National Council on Governmental Accounting relating to the physical, economic, social, and political characteristics of the government, and any other information required by the

Congress. The Governor shall also make such other reports at such other times as may be required by the Congress or under applicable Federal law. He shall also submit to the Congress, the Secretary of the Interior, and the cognizant Federal auditors a written statement of actions taken or contemplated on Federal audit recommendations within sixty days after the issuance date of the audit report. He shall have the power to issue executive orders and regulations not in conflict with any applicable law. He may recommend bills to the legislature and give expression to his views on any matter before that body.

[Concluding undesignated para. unchanged]

(As amended Oct. 19, 1982, P. L. 97-357, Title I, § 104(a), 96 Stat. 1705.)

APPENDIX I

48 U.S.C.S. § 1422a TERRITORIES AND POSSESSIONS

§ 1422a. Initiative and referendum; removal

(a) The people of Guam shall have the right of initiative and referendum, to be exercised under conditions and procedures specified in the laws of Guam.

(b) Any Governor, Lieutenant Governor, or member of the legislature of Guam may be removed from office by a referendum election in which at least two-thirds of the number of persons voting for such official in the last preceding general election at which such official was elected vote in favor of recall and in which those so voting constitute a majority of all those participating in such referendum election. The referendum election shall be initiated by the

legislature of Guam following (a) a two-thirds vote of the members of the legislature in favor of a referendum, or (b) petition for such a referendum to the legislature by registered voters equal in number to at least 50 per centum of the whole number of votes cast at the last general election at which such official was elected preceding the filing of the petition.

(As amended Oct. 19, 1982, P.L. 97-357, Title I, § 101, 96 Stat. 1705)

APPENDIX J

48 U.S.C.S. § 1422d. Transfer of functions, powers, and duties from government comptroller to Inspector General; audit, report

(a) Transfer of functions to Inspector General. The following functions, powers, and duties heretofore vested in the government comptroller for Guam are hereby transferred to the Inspector General, Department of the Interior, for the purpose of establishing an organization which will maintain a satisfactory level of independent audit oversight of the government of Guam:

(1) The authority to audit all accounts pertaining to the revenue and receipts of the government of Guam, and of funds derived from bond issues, and the authority to audit, in accordance with law and administrative regulations, all

expenditures of funds and property pertaining to the government of Guam including those pertaining to trust funds held by the government of Guam.

APPENDIX K

48 U.S.C.S. § 1423a. Power of Legislature; limitation on indebtedness of Guam; bond issues; guarantees for purchase by Federal Financing Bank of Guam Power of Authority bonds or other obligations; interest rates; default

The legislative power of Guam shall extend to all subjects of legislation of local application not inconsistent with the provisions of this Act and the laws of the United States applicable to Guam. Taxes and assessments on property, internal revenues, sales, license fees, and royalties for franchises, privileges, and concessions may be imposed for purposes of the government of Guam as may be uniformly provided by the Legislature of Guam, and when necessary to anticipate taxes and revenues, bonds and other obligations may be issued by the government of Guam:

Provided, however, That no public indebtedness of Guam shall be authorized or allowed in excess of 10 per centum of the aggregate tax valuation of the property in Guam. Bonds or other obligations of the government of Guam payable solely from revenues derived from any public improvement or undertaking shall not be considered public indebtedness of Guam within the meaning of this section. All bonds issued by the government of Guam or by its authority shall be exempt, as to principal and interest, from taxation by the Government of the United States or by the government of Guam, or by any State or Territory or any political subdivision thereof, or by the District of Columbia. The Secretary of the Interior (hereafter in this section referred to as "Secretary") is authorized to guarantee for purchase by the Federal Financing Bank bonds or other obligations

of the Guam Power Authority maturing on or before December 31, 1978, which shall be issued in order to refinance short-term notes due or existing on June 1, 1976 and other indebtedness not evidenced by bonds or notes in an aggregate amount of not more than $36 million, and such bank, in addition to its other powers, is authorized to purchase, receive or otherwise acquire these same. The interest rate on obligations purchased by the Federal Financing Bank shall not be less than a rate determined by the Secretary of the Treasury taking into consideration the current average market yield on outstanding marketable obligations of the United States of comparable maturities, adjusted to the nearest one-eighth of 1 per centum, plus 1 per centum per annum. The Secretary, with the concurrence of the Secretary of the Treasury, may extend the guarantee

provision of the previous sentence until December 31, 1980. The Secretary, upon determining that the Guam Power Authority is unable to refinance on reasonable terms the obligations purchased by the Federal Financing Bank under the fifth sentence of this section by December 31, 1980, may with the concurrence of the Secretary of the Treasury, guarantee for purchase by the Federal Financing Bank, and such bank is authorized to purchase, obligations of the Guam Power Authority issued to refinance the principal amount of the obligations guaranteed under the fifth sentence of this section. The obligations that refinance such principal amount shall mature not later than December 31, 1990, and shall bear interest at a rate determined in accordance with section 6 of the Federal Financing Bank Act (12 U.S.C. 2285) [12 USCS § 2285]. At the request of the Board of Directors of the Guam Power

Authority for a second refinancing agreement and conditioned on the approval of the Government of Guam pursuant to the law of Guam, and conditioned on the establishment of an independent rate-making authority by the Government of Guam, the Secretary may guarantee for purchase by the Federal Financing Bank, on or before December 31, 1984, according to an agreement that shall provide for-

(a) substantially equal semiannual installments of principal and interest.

(b) maturity of obligations no later than December 31, 2004.

(c) authority for the Secretary, should there be a violation of a provision of this legislation, or covenants or stipulations contained in the refinancing document and after giving sixty days notice of such violation to the Guam Power Authority and the Governor of Guam, to dismiss members of the Board of Directors

or the general manager of the Guam Power Authority, and (1) appoint in their place members or a general manager who shall serve at the pleasure of the Secretary, or (2) contract for the management of the Guam Power Authority, and (d) an annual simple interest rate of seven per centum, and the Federal Financing Bank shall purchase such Guam Power Authority obligations if such Guam Power Authority obligations are issued to refinance the principal amount scheduled to mature on December 31, 1990. Should such second refinancing occur, (1) the independent rate-making authority to be established by the Government of Guam, or in its absence, the Board of Directors of the Guam Power Authority, shall establish rates sufficient to satisfy all financial obligations and future capital investment needs of the Guam Power Authority that shall be consistent with generally

accepted rate-making practices of public utilities, and (2) the Government of Guam shall not modify the requirements of such refinancing agreement without agreement of the Secretary. There are authorized to be appropriated to the Secretary of the Interior for payment to the Federal Financing Bank such sums as are necessary to pay (1) the repurchase payment required under the fifth paragraph of the December 31, 1980, noted from the Guam Power Authority to the Federal Financing Bank and any subsequent repurchase payments required under the second refinancing agreement, and (2) the interest rate differential between the seven per centum to be paid by the Guam Power Authority and the second refinancing agreement and the interest rate that would otherwise be determined in accordance with the above cited section 6 of the Federal Financing Bank Act [12 USCS § 2285].

Should the Guam Power Authority fail to pay in full any installment of interest or principal when due on the bonds or other obligations guaranteed under this section, the Secretary of the Treasury, upon notice from the Secretary shall deduct and pay to the Federal Financing Bank or the Secretary, according to their respective interests, such unpaid amounts from sums collected and payable pursuant to section 30 of this Act (48 U.S.C. 1421h) [48 USCS § 1421h]. Notwithstanding any other provision of law, Acts making appropriations may provide for the withholding of any payments from the United States to the government of Guam which may be or may become due pursuant to any law and offset the amount of such withheld payments against any claim the United States may have against the government of Guam or the Guam Power Authority pursuant to this guarantee. For

the purpose of this Act, under section 3466 of the Revised Statutes (31 U.S.C. 191) [USCS § 191] the term "person" includes the government of Guam and the Guam Power Authority. The Secretary may place such stipulations as he deems appropriate on the bonds or other obligations he guarantees.

(As amended Oct. 5, 1984, P.L. 98-454, Title II, § 203, 98 Stat. 1733.)

APPENDIX L

48 U.S.C.S. § 1423i. Approval of bills

Every bill passed by the legislature shall, before it becomes a law, be entered upon the journal and presented to the Governor. If he approves it, he shall sign it, but if not he shall, except as hereinafter provided, return it, with his objections, to the legislature within ten days (Sundays excepted) after it shall have been presented to him. If he does not return it within such period, it shall be a law in like manner as if he had signed it, unless the legislature by adjournment prevents its return, in which case it shall be a law if signed by the Governor within thirty days after it shall have been presented to him; otherwise it shall not be a law. When a bill is returned by the Governor to the legislature with his objections, the

legislature shall enter his objections at large on its journal and, upon motion of a member of the legislature, proceed to reconsider the bill. If, after such reconsideration, two-thirds of all the members of the legislature pass the bill, it shall be a law. If any bill presented to the Governor contains several items of appropriation of money, he may object to one or more of such items, or any part or parts, portion or portions thereof, while approving the other items, parts, or portions of the bill. In such a case he shall append to the bill, at the time of signing it, a statement of the items, or parts or portions thereof, to which he objects, and the items, or parts or portions thereof, so objected to shall not take effect. All laws enacted by the legislature shall be reported by the Governor to the head of the department or agency designated by the President under

section 3 of this Act [48 USCS § 1421a]. The Congress of the United States reserves the power and authority to annul the same. (Aug. 1, 1950, ch 512, § 19, 64 Stat. 389; Sept. 11, 1968, P.L. 90-497, § 8, 82 Stat. 847; Jan. 2, 1975, P.L. 93-608, § 1(14), 88 Stat. 1969.)

APPENDIX M

42 U.S.C.S. § 1301. Definitions

(a) When used in this Act-

(1) The term "State", except where otherwise provided, includes the District of Columbia and the Commonwealth of Puerto Rico, and when used in titles IV, V, VII, XI, and XIX [42 USCS §§ 601 et. seq., 701 et seq., 901 et seq., 1301 et seq.] includes the Virgin Islands and Guam. Such terms when used in titles III, IX, and XII [42 USCS §§ 501 et seq., 1101 et seq., 1321 et seq.] also includes the Virgin Islands. Such term when used in title V [42 USCS §§ 701 et seq.] and in part B of this title [42 USCS §§ 1320c et seq.] also includes American Samoa, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands. Such term when used in title XIX [42 USCS §§

1396 et seq.] also includes the Norther Mariana Islands and American Samoa. In the case of Puerto Rico, the Virgin Islands, and Guam, titles I, X, and XIV, and title XVI [42 USCS §§ 301 et seq., 1201 et seq., 1351 et seq., 1381 et seq.] (as in effect without regard to the amendment made by section 301 of the Social Security Amendments of 1972 [42 USCS §§ 1381 et seq.]) shall continue to apply, and the term "State" when used in such titles (but not in title XVI [42 USCS §§ 1381 et seq.] as in effect pursuant to such amendment after December 31, 1973) includes Puerto Rico, the Virgin Islands, and Guam.. Such term when used in title XX [42 USCS §§ 1381 et seq.] also includes the Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands. Such term when used in title IV [42 USCS §§ 60] et se.] also includes American Samoa

(2)-(7) [Unchanged]

(8)(A) [Unchanged

(B) The Federal percentage for each State (other than Puerto Rico, the Virgin Islands and Guam) shall be promulgated by the Secretary between October 1 and November 30 of each year, on the basis of the average per capita income of each State and of the United States for the three most recent calendar years for which satisfactory data are available from the Department of Commerce. Such promulgation shall be conclusive for each of the four quarters in the period beginning October 1 next succeeding such promulgation: Provided, That the Secretary shall promulgate such percentages as soon as possible after the enactment of the Social Security Amendments of 1958 [enacted Aug. 28, 1958], which promulgation shall be conclusive for each of the eleven

quarters in the period beginning October 1, 1958, and ending with the close of June 30, 1961

(C), (D) [Unchanged]

(9) [Unchanged]

(b)-(d) [Unchanged]

(As amended Apr. 7, 1986, P.L. 99-272, Title IX, Subtitle B. § 9528(a). 100 Stat. 219. Oct. 22, 1986, P.L. 99-514, Title XVIII, Subtitle C, Ch 1, §§ 1883(c)(1), 1895(c)(6), 100 Stat. 2918, 2936; Dec. 22 ,1987, P.L. 100-203, Title IX, Subtitle B, Part 2, § 9135(a)(1), (b)(1), 101 Stat. 1330-315; Oct. 13, 1988, P.L. 100-485, Title VI, § 601(a), 102 Stat. 2407)

APPENDIX N

42 U.S.C.S. § 8802 PUBLIC HEALTH AND WELFARE

(ii) the acquisition of land and improvements thereon for the construction, expansion, or improvement of such a project, or the conversion of a facility to such a project.

(C) Such term does not include the acquisition of any facility which was operated as a biomass energy project before the acquisition.

(10) The term "Federal agency" means any of

the following forms of financial assistance provided under this title, or any combination of such forms:

(i) loans,

(ii) loan guarantees,

(iii) price guarantees, and

(iv) purchase agreements.

(B) Such term includes any commitment to provide such assistance.

(12) The term "Indian tribe" means any Indian tribe, band, nation or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act [43 USCS §§ 1601 et seq.] which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(13) The term "motor fuel" means gasoline, kerosene, and middle distillates (including diesel fuel).

(14)(A) The term "municipal waste" means organic matter, including sewage, sewage sludge, and industrial or commercial waste, and mixtures of such matter and inorganic refuse-

(i) from any publicly or privately operated municipal waste collection or similar disposal system, or

(ii) from similar waste flows (other than such flows which constitute agricultural wastes or residues, or wood wastes or residues from wood harvesting activities or production of forest products).

(B) Such term does not include any hazardous waste, as determined by the Secretary of Energy for purposes of this title.

(15)(A) The term "municipal waste energy project" means any facility (or portion of a facility) located in the United States primarily for-

(i) the production of biomass fuel (and byproducts) from municipal waste; or

(ii) the combustion of municipal waste for the purpose of generating steam or

forms of useful energy, including industrial process heat, mechanical power, or electricity (including cogeneration).

(B) Such term includes any necessary transportation, preparation, and disposal equipment and machinery for use in or at the site of the facility involved.

APPENDIX O

Rule 26-1. Filing Deadlines for the District of Guam and the Northern Mariana Islands

Except as provided by order of the court, or by FRAP 26(b) and 31, all deadlines for filing set forth in FRAP or these rules are extended by 7 days in cases arising from the Districts of Guam and the Northern Mariana Islands.

APPENDIX P

CERTIFICATE OF FILING AND MAILING

I, **CASSANDRA Y. BOSLEY**, do hereby declare and certify as follows:

I am over the age of eighteen (18) years and am a resident of the Territory of Guam. All the facts stated herein are personally known to me and I have firsthand knowledge of the same. As to those facts stated upon information and belief, I believe them to be true and correct. If called upon as a witness, I could and would competently testify thereto under oath.

On the 20th day of August, 1991, three (3) copies and an original of Plaintiff/Appellant's Request for Rehearing were sent vial DHL Courier Service to the Clerk, United States Court of Appeals for the Ninth Circuit, U.S.

Court of Appeals and Post Office Building, 7th & Mission Streets, Post Office Box 547, San Francisco, California 94101.

I further certify that a copy of Plaintiff/Appellant's Request for Rehearing will be served on August 20, 1991, to Kenneth D. Orcutt, Assistant Attorney General, Office of the Attorney General, Government of Guam, The Judicial Center, Agana, Guam 96910, as attorneys for Defendants/Appellees herein.

I further declare that said filing and service was made at the direction of an attorney duly licensed to practice in this Court.

Executed this 20th day of August, 1991, at Agana, Guam.

(Sgd.) **CASSANDRA Y. BOSLEY**

APPENDIX Q

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MILDRED LOUISE BLAS, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN MARVIN BLAS, ON HER OWN BEHALF, AND AS GUARDIAN FOR THE MINOR, MARVIN JOHN BORJA,	CASE NO. 90-16048 D.C. CASE NO. CV89-00052-DHM S.C. CASE NO. CV1103-86
Plaintiffs-Appellants,	
v.	**AFFIDAVIT OF WILFRED C.AFLAGUE IN SUPPORT OF MOTION TO DISMISS**
GOVERNMENT OF GUAM, JOSE T. CHARFAUROS, INDIVIDUALLY AND AS DIRECTOR OF THE DEPARTMENT OF CORRECTIONS) FREDERICK B. QUINENE, INDIVIDUALLY AND AS DEPUTY DIRECTOR OF THE DEPARTMENT OF CORRECTIONS) VICENTE CASTRO, INDIVIDUALLY AND AS SUPERINTENDENT OF THE DEPARTMENT OF CORRECTIONS) GOVERNMENT OF GUAM,	
Defendants-Appellees.	

I, **WILFRED G. AFLAGUE**, being first duly sworn, do hereby depose and say:

1. That I am the Director of the Department of Administration for the Government of Guam.

2. As such, I am responsible by law for accounting for all money received and expended by the Government of Guam.

3. Attached hereto is a true and correct copy of a portion of the combined financial statements of the Government of Guam as of September 30, 1989 and for the year then ended. This document was produced by the Department of Administration in its usual course of business.

4. This statement indicates that out of $372,405,747 in revenues received by the government of Guam in fiscal year 1989, only $47,676,051 or approximately 12.8% was received from the federal government.

Dated this 10th day of January, 1991.

(Sgd.) **WILFRED G. AFLAGUE**

SUBSCRIBED AND SWORN TO before me this 10th day of January, 1991.

_____

(Sgd.) **NOTARY PUBLIC**

(3)

91-1215

Supreme Court, U.S.
FILED
FEB 13 1992
OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

MILDRED LOUISE BLAS, et al.,
Petitioners,

v.

GOVERNMENT OF GUAM, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ELIZABETH BARRETT-ANDERSON
Attorney General

JOHN PATRICK MASON
Deputy Attorney General
Counsel of Record
For Respondents, Government of Guam
Suite 2-200E
Judicial Center Building
120 West O'Brien Drive
Agaña, Guam 96910
Tel. No. (671) 475-3324

TABLE OF CONTENTS

		Page
Table of Authorities		ii-iv
I.	Additional Statutory Provisions Involved	1
II.	Summary of Argument.....	6
III.	Argument.....	7
	A. Blas' Petition fails to set forth any reason why this Court should grant Certiorari.....	7
	B. The Decision of the Ninth Circuit Court of Appeals dismissing Petitioner's appeal is well founded in law.....	10
IV.	Conclusion.....	22

TABLE OF AUTHORITIES

	Page
Bank of America, Nat'l. Trust & Sav. Assn. v. Chaco, 539 F.2d 1226 (9th Cir. 1976)...	15
Blas v. Guam, 941 F.2d 778 (9th Cir. 1991).....	8
Diaz v. Trust Territory of the Pacific Islands, 876 F.2d 1401 (9th Cir. 1989).....	20
Harris v. Boreham, 233 F.2d 110 (3rd Cir. 1956).....	18
In Re Hoag Ranches, 846 F.2d 1225 (9th Cir. 1988).....	12,13
Kawananakao v. Polybank, 205 U.S. 349 (1907)	14
Marx v. Guam, 866 F.2d 294 (9th Cir. 1989).....	15
National Indus., Inc. v. Republic Nat. Life Ins. Co., 677 F.2d 1258 (9th Cir. 1982)...	11
Ngiraringas v. Sanchez, 858 F.2d 1368 (9th Cir. 1988) aff'd, 495 U.S. 182 (1990).....	11,13
Porto Rico v. Rosaly, 227 U.S. 270 (1913).....	15,19

Table of Authorities (cont'd)

	Page
Sakamoto v. Duty Free Shoppers, Ltd., 764 F.2d 1285 (9th Cir. 1985), cert. denied, 475 U.S. 1081 (1986).....	12
Wallace v. Chappell, 637 F.2d 1345 (9th Cir. 1981).....	10,11,22

FEDERAL RULES

Fed. R. App. P. 4(a).....	5,7,11, 19,20
Sup. Ct. R. 10.1.....	9

STATUTES

GUAM CIV. PROC. CODE §81.....	21
GUAM CIV. PROC. CODE §82.....	1,14,22
GUAM CODE ANN. TITLE 5 §6401.....	1
GUAM CODE ANN. TITLE 5 §6404.....	2,16
GUAM CODE ANN. TITLE 5 §30101....	4,21
GUAM CODE ANN. TITLE 5 §30103....	4,21
15 U.S.C. §2052.....	17
42 U.S.C. §1301.....	17

Table of Authorities (cont'd)

	Page
42 U.S.C. §8802.....	17
48 U.S.C. §1421 et seq.....	14
48 U.S.C. §1421a.....	17
48 U.S.C. §1421(h).....	15
48 U.S.C. §1421i.....	15
48 U.S.C. §1422.....	21
48 U.S.C. §1423.....	21
48 U.S.C. §1424-1.....	14

I. ADDITIONAL STATUTORY PROVISIONS INVOLVED

Guam Code of Civil Procedure §82. Original Jurisdiction.

The Superior Court shall have original jurisdiction in all cases arising under the laws of Guam, civil or criminal, in law or equity, regardless of the amount in controversy, except for causes arising under the Constitution, treaties, laws of the United States, and any matter involving the Guam Territorial income tax. [Enacted 1953; amended by P.L. 5-256, effective January 8, 1969; repealed and reenacted by P.L. 12-85, effective July 1, 1974.]

Title 5, Guam Code Annotated §6401. Claims Fund Created.

(a) Creation. The Government Claims Fund is hereby created and established as

an account which shall be separately identified and maintained by the Department of Administration. It shall consist of such funds as have been appropriated by the Legislature for the purpose of paying claims pursuant to this Chapter and unspent on the effective date of this Chapter and such appropriations made for this purpose thereafter.

(b) Reports by the Attorney General. Upon the settlement of any claim by the Attorney General, or final judgment in any action under this Chapter, the Attorney General shall designate which line agency incurred the liability which requires payment, and whether the liability arose under tort or contract.

Title 5, Guam Code Annotated §6404. Budgeting for Claims.

(a) The annual budget recommendations for governmental operations

transmitted from the Governor to the Legislature, or the annual budget of each autonomous agency, shall include an amount for each agency, line or autonomous, as the case may be, for payment of claims made pursuant to this Chapter and generated by the activities of such agency. The amount shall be at least equal to the arithmetic average of amounts paid out of the Government Claims Fund, or operating fund, as the case may be, on behalf of such line or autonomous agency, as determined and recorded by the Department of Administration, or by the autonomous agency, for the three fiscal years immediately preceding the year in which the recommendation is being made. The amounts requested may be decreased by the amount of insurance coverage purchased and in force.

Title 5, Guam Code Annotated §30101. Attorney General.

The Department of Law of the government of Guam shall be administered by the Attorney General of Guam, who shall be appointed by the Governor for a term of four (4) years, or until the end of the term of the appointing governor, whichever is sooner, with the advice and consent of the Legislature. [The Governor may remove the Attorney General for cause.] The incumbent [1976] Attorney General need not be reappointed nor reconfirmed by the Legislature.

Title 5, Guam Code Annotated §30103. Common Law Powers of Attorney General.

The Attorney General shall have, in addition to the powers expressly conferred upon him by this Chapter, those common law powers which include, but are not limited to, the right to bring suit to challenge laws which he believes to be

unconstitutional and to bring action on behalf of the Territory representing the citizens as a whole for redress of grievances which the citizens individually cannot achieve, unless expressly limited by any law of Guam to the contrary. The Attorney General may permit attorneys admitted to private practice in Guam or licensed collection agents to collect accounts or other obligations owing to the government of Guam, or to any agency or instrumentality thereof, if such procedure would be in the interest of the Government and expedite the collection of said account or obligation. Any agency or instrumentality not operating under yearly appropriations from the Legislature may retain counsel of its choice for the collection of obligations in the same manner as it may be permitted to retain counsel in other matters as permitted by

its enabling legislation. Guam Memorial Hospital may permit the Attorney General or attorneys admitted to private practice in Guam and agents or licensed collection agents to collect accounts or other obligations owing to Guam Memorial Hospital.

II. SUMMARY OF ARGUMENT

Petitioner Blas sets forth no special and important reasons for granting certiorari. This case concerns the narrow issue of whether a territory is an agency of the United States under Fed. Rule of App. P. 4(a)(1). Blas has misconstrued the issue of this case when she asks this court to determine whether Guam is a federal agency for other purposes than under Rule 4(a).

The decision of the Ninth Circuit Court of Appeals dismissing petitioner's appeal is well founded in law. Guam is not an agency of the United States under Rule 4(a). Guam elects its own governor, collects a territorial income tax to finance itself, has its own Attorney General and there is no federal involvement in its litigation decision making processes.

III. ARGUMENT

A. BLAS' PETITION FAILS TO SET FORTH ANY REASON WHY THIS COURT SHOULD GRANT CERTIORARI.

Petitioner Blas asks this Court to decide whether Guam is an agency of the federal government for all purposes, yet nowhere in her petition is any reason set

forth as to why this case presents such a broad issue to the court. In reality, this case concerns a very narrow issue involving the interpretation of Federal Rule of Appellate Procedure 4(a)(1).

The Ninth Circuit Court of Appeals correctly stated the issue of this case in its opinion at 941 F.2d 778.

> The dispositive issue here is whether the appeal is untimely because it was not filed within the 30-day period provided in Fed. R. App. P.4(a)(1). Blas mantains that she is entitled to the 60-day period provided in that Rule for cases in which the United States or one of its agencies is a party.

Blas v. Guam 941 F.2d 778 (9th Cir. 1991).

There is no reason for this Court to grant certiorari on the narrow issue of whether Guam is an agency of the United States under Rule 4(a)(1).

Under Sup. Ct. R. 10.1:

> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor.

Blas sets forth no special and important reasons for granting her petition for certiorari. The Ninth Circuit Court of Appeals decision does not conflict with the decision of any other Court's interpretation of Rule 4(a). This case presents an issue of first impression.

That this issue has not risen before is an indication that this case does not involve an important question of federal law. Only residents of the territories of the United States appealing to a Court of Appeals from a decision in which a territorial government is a party will be affected by the outcome of this case.

Petitioner's failure to file within the 30 day time period in this case appears to be a simple case of legal malpractice by petitioner's attorney.

B. THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS DISMISSING PETITIONER'S APPEAL IS WELL FOUNDED IN LAW.

Fed. Rule of App. P. 4(a)(1) provides, in relevant part:

> (1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry...

Because Blas filed her notice of appeal on the 60th day after the opinion of the District Court of Guam was entered, Blas'

notice of appeal is untimely unless the government of Guam is an agency of the United States under Rule 4(a)(1).

The purpose of allowing an additional 30 days for filing a notice of appeal when a government agency is a party is to provide sufficient time for routing the case to government officials who have responsibility for deciding whether or not to take an appeal. Wallace v. Chappell, 637 F.2d 1345, 1347 (9th Cir. 1981) (en banc).

Failure to file within these time periods is considered jurisdictional. National Indus., Inc. v. Republic Nat. Life Ins. Co., 677 F.2d 1258, 1263 (9th Cir. 1982).

Guam can be considered to be an instrumentality of the federal government. Ngiraingas v. Sanchez, 858 F.2d 1368 (9th Cir. 1988) aff'd, 495 U.S. 182

(1990), Sakamoto v. Duty Free Shoppers, Ltd., 764 F.2d 1285 (9th Cir. 1985), cert. denied, 475 U.S. 1081 (1986).

However, an entity does not become a government agency under Rule 4(a)(1) simply because it is federally regulated. In Re Hoag Ranches, 846 F.2d 1225 at 1227 (9th Cir. 1988). "Nor is it dispositive that the organization is designated as a federal instrumentality..." In re Hoag Ranches, supra at 1227.

Hoag Ranches lists six factors to be considered in making a determination of whether an organization is a federal agency under Rule 4(a)(1):

> ...(1) the extent to which the alleged agency performs a governmental function; (2) the scope of government involvement in the organization's management; (3) whether its operations are financed by the government; (4) whether persons other than the government have a proprietary interest in the alleged agency and whether the

> government's interest is merely custodial or incidental; (5) whether the organization is referred to as an agency in other statutes; and (6) whether the organization is treated as an arm of the government for other purposes, such as amenability to suit under the Federal Tort Claims Act.

In Re Hoag Ranches, supra at 1227 - 1228.

Under the factors listed in Hoag Ranches, the government of Guam should not be considered an agency of the United States for purposes of Rule 4(a)(1).

(i) THE EXTENT TO WHICH THE ALLEGED AGENCY PERFORMS A GOVERNMENTAL FUNCTION; AND THE SCOPE OF GOVERNMENT INVOLVEMENT IN THE ORGANIZATION'S MANAGEMENT

While the government of Guam performs a governmental function this governmental function is akin to that of a state, not a federal agency.

As was stated in Ngiraingas v. Sanchez, supra at 1371:

> [2] Admittedly, the analogy between Guam and an administrative agency such as the Federal Trade Commission is counterintuitive. Guam seems more like a state or a municipality than a run-of-the-mill federal agency. After all, Guam elects government officials, its citizens participate politically and the territory enjoys many of the trappings of a sovereign governmental entity. See 48 U.S.C. §§1421-1428e.

The scope of the United States government involvement in the management of the government of Guam is very limited. Under Guam's Organic Act, 48 U.S.C. §1421 et seq., Guam's citizens elect a legislature, and a Governor. Pursuant to 48 U.S.C. §1424-1 the Guam Legislature has established a local court system. See GUAM CIV. PROC. CODE §82. This court and the Courts of Appeals have recognized that territorial governments like Guam have a form of inherent or common law sovereign immunity. Kawananakao v.

Polybank, 205 U.S. 349, 353 (1907) (Hawaii), and Porto Rico v. Rosaly, 227 U.S. 270, 273 (1913) (Puerto Rico). Marx v. Guam, 866 F.2d 294 (9th Cir. 1989). The government of Guam is a body politic, not a federal agency.

(ii) WHETHER GUAM'S OPERATIONS ARE FINANCED BY THE U.S. GOVERNMENT

For the most part, the United States Government does not finance the operations of the government of Guam. Under Guam's Organic Act, 48 U.S.C. §1421i, the government of Guam collects territorial income tax in lieu of direct appropriation from the United States treasury. Bank of America, Nat'l. Trust & Sav. Assn. v. Chaco, 539 F.2d 1226 (9th Cir. 1976). Federal income taxes derived from Guam are held by the United States on account for the government of Guam. See 48 U.S.C. §1421(h).

Out of $372,405,747 in revenues received by the government of Guam in fiscal year 1989, only $47,676,051 or approximately 12.8% was received from the federal government. (Aflague affidavit, Appendix P).

The United States has no financial interest in the outcome of this appeal. Any money paid to satisfy petitioner's claim would be paid from a claims fund set up within the Department of Administration for the government of Guam. See GUAM CODE ANN. TITLE 5 §6404 et seq. The government of Guam is not financially dependent on the United States.

(iii) WHETHER PERSONS OTHER THAN THE GOVERNMENT HAVE A PROPRIETARY INTEREST IN THE ALLEGED AGENCY AND WHETHER THE GOVERNMENT'S INTEREST IS MERELY CUSTODIAL OR INCIDENTAL.

The people of Guam have a proprietary interest in the government of Guam.

It is their government operated by the officials they elect. It is a body politic. The United States interest in Guam is not proprietary.

(iv) WHETHER THE ORGANIZATION IS REFERRED TO AS AN AGENCY IN OTHER STATUTES.

Guam is generally not referred to as an agency of the federal government. It is generally referred to as a territory of the United States, e.g. 48 U.S.C. §1421a. In many federal statutes it is included under the definition of a state, e.g. 42 U.S.C. 8802, 42 U.S.C. §1301, and 15 U.S.C. §2052.

(v) WHETHER THE ORGANIZATION IS TREATED AS AN ARM OF THE GOVERNMENT FOR OTHER PURPOSES, SUCH AS AMENABILITY TO SUIT UNDER THE FEDERAL TORT CLAIMS ACT.

The government of Guam is not a governmental agency under the Federal

Tort Claims Act. See Harris v. Boreham, 233 F.2d 110 (3rd Cir. 1956).

In Harris, the court held that Saint Thomas, one of the Virgin Islands, is not a federal agency within the Federal Tort Claims Act but is an independent body politic.

> [7] We think it clear that by the Organic Act of June 22, 1936, Congress did the same with respect to the two municipalities which then constituted the Virgin Islands. That Act constituted each municipality into a body politic and juridic with perpetual succession and with power to acquire property, to possess, administer, and govern such property and to alienate or encumber it. It provided for a municipal council in each municipality with local legislative powers, a Legislative Assembly with legislative powers for the Virgin Islands as a whole, a Governor to act as chief executive of the Virgin Islands as a whole and of each of the two municipalities and a district court to exercise the judicial power of the Islands. As the Supreme Court said with

> respect to the Organic Act of Puerto Rico, "the purpose of Congress * * * was to follow the plan applied from the beginning to the organized territories by creating a government conforming to the American system with defined and divided powers,--legislative, executive and judicial * * *." People of Porto ico v. Rosaly y Castillo, 1913, 227 U.S. 270, 276-277, 33 S.Ct. 352, 354.
>
> * * *
>
> It is thus clear that the Municipality of St. Thomas and St. John in the unincorporated territory of the Virgin Islands was a body politic quite distinct from the Government of the United States and that it had attributes of sovereignty which had been delegated to it by the Government of the United States but which were distinct from the powers of that government. It is equally clear that the municipality was endowed by Congress with the sovereign power to acquire, administer, govern and alienate property and that such property must be regarded as belonging to the municipality rather than the United States.

Harris v. Boreham, supra, at 114.

Recently, the Ninth Circuit Court of Appeals applied the Hoag standard in

determining that the Trust Territory of the Pacific Islands is an agency of the federal government under Fed. R. App. P. 4(a)(1) in Diaz v. Trust Territory of the Pacific Islands, 876 F.2d 1401 (9th Cir. 1989). The Court found that the Trust Territory was a federal agency because

> It performs a governmental function; the President appoints the TT High Commissioner, it executive, with the advice and consent of the U.S. Senate; its operations are largely paid for by the U.S. Treasury; no other persons have a proprietary interest in the TT government; and the U.S. government's interest is not "merely custodial." Although the TT government is represented by private counsel for this appeal, the litigation decision-making process includes the U.S. government.

876 F.2d at 1405. In contrast, Guam's Governor and Legislature are both elected by the citizens of Guam and the judiciary is appointed by the Governor with the consent of the Guam Legislature. See

48 U.S.C. §§1422, 1423, and GUAM CIV. PROC. CODE §§81, 82. The operation of the government of Guam is largely paid for by the revenues raised on Guam and the litigation decision-making process does not include the United States government.

No United States attorney is involved in representing the government of Guam on this matter. No United States official is being consulted in this case. The Attorney General of Guam, as part of the executive branch established in Guam's Organic Act, is representing the government. See GUAM CODE ANN. TITLE 5, §§30101, 30103.

To allow an additional 30 days for filing a notice of appeal in this case would be inconsistent with the purpose of Rule 4(a)(1). The purpose of allowing an additional 30 days for filing a notice of appeal when a government agency is a

party is to provide sufficient time for routing the case to federal government officials who have responsibility for deciding whether or not to take an appeal. Wallace v. Chappel, supra at 1347.

There is no reason to grant the government of Guam an additional 30 days to consult with federal officials when there are no federal officials being consulted.

IV. CONCLUSION

There are no special and important reasons to grant petitioner's petition for a writ of certiorari. The issue in this case is a very narrow one and is unlikely to arise again.

The government of Guam is an independent body politic and not a federal

agency under Fed. R. App. P. Rule 4(a)(1). Blas' appeal was properly dismissed for failing to file her notice of appeal within 30 days after the date of entry of the opinion of the Guam District Court.

Petitioner's petition for writ of certiorari should be denied.

Dated this 13th day of February, 1992.

ELIZABETH BARRETT-ANDERSON
Attorney General

By:
JOHN PATRICK MASON
Deputy Attorney General
Counsel of Record
Respondents, Government
of Guam